

¹ The Board notes that following the April 29, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

On September 17, 2018 Dr. Mark A. Seldes, Board-certified in family medicine, discussed appellant's continued complaints of pain and swelling in her knees bilaterally. He provided examination findings and noted that she had requested a renewal of physical and massage therapy prescriptions.

On November 27, 2018 OWCP received a request for physical/occupational therapy and/or massage therapy for a period beginning September 17, 2018. Dr. Seldes prescribed physical/occupational and/or massage therapy.

In a development letter dated November 28, 2018, OWCP informed appellant that it had received a request to authorize physical therapy for her knees for the period September 24 through December 13, 2018. It advised her of the type of evidence needed, including a report from her attending physician addressing her injury-related residuals and explaining the need for physical therapy and/or massage therapy. OWCP afforded appellant 30 days to submit the necessary evidence.

In a report dated December 17, 2018, Dr. Seldes reviewed OWCP's November 28, 2018 development letter. He advised that appellant required physical and massage therapy due to her pain in both knees and because she refused "any further opiate therapy." Dr. Seldes opined that physical therapy would help to decrease her daily pain, improve her daily disability, and allow her to perform her activities of daily living without as much discomfort.

By decision dated February 20, 2019, OWCP denied authorization for physical therapy and/or massage therapy.

Appellant appealed to the Board. By order dated February 20, 2020, the Board found that the case was not in posture for a decision and remanded for OWCP to consider all of the evidence and provide clear reasons regarding its denial of appellant's request for authorization for physical therapy in a *de novo* decision.²

OWCP subsequently received February 19 and April 23, 2019 reports, wherein Dr. Seldes continued to diagnose bilateral internal knee derangement, bilateral torn medial menisci, bilateral knee osteoarthritis, chondromalacia of the right knee joint, and status post arthroscopic left knee partial lateral meniscectomy and repair. Dr. Seldes strongly recommended continued physical and massage therapy as appellant continued to have difficulties with climbing stairs, prolonged ambulation, standing, sitting, and reclining due to pain in her knees. He also found that her bilateral knee condition had deteriorated and recommended possible surgical intervention.

In an April 14, 2020 development letter, OWCP advised appellant that additional medical evidence was required from her treating physician before further physical therapy and/or massage therapy could be authorized. It noted that physical therapy and/or massage therapy had been furnished for an extended period of time, but had not resulted in the increased function or decrease in the level of disability from the conditions accepted due to her May 14, 2013 employment injury.

² Docket No. 19-0831 (issued February 20, 2020).

By decision dated April 29, 2020, OWCP again denied appellant's request for authorization for physical and/or massage therapy. It reviewed Dr. Seldes' reports as well as its procedures³ and found that pain alone was not a basis to grant a request for authorization for therapy.

The Board has duly considered this matter and finds that this case is not in posture for decision. Section 10.121 of OWCP's regulations provides that if a claimant submits factual evidence, medical evidence, or both in support of his or her claim, but OWCP determines that this evidence is not sufficient to meet the burden of proof, it will inform the claimant of the additional evidence needed and provide the claimant at least 30 days to submit the evidence required.⁴ It is well established that proceedings under the Federal Employees' Compensation Act⁵ (FECA) are not adversarial in nature. OWCP shares responsibility in the development of the evidence and has an obligation to see that justice is done.⁶ The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.⁷

As the 30-day period for submission of additional evidence, which began with the April 14, 2020 development letter, had not expired at the time OWCP issued its April 29, 2020 decision denying appellant's claim, the Board finds that it did not fulfill its responsibility under section 10.121 of its regulations.⁸

Thus, the Board finds that this case must be remanded for proper application of section 10.121 of OWCP's regulations, allowing appellant 30 days to respond to the request for additional evidence, to be followed by a *de novo* decision. Accordingly,

³ Federal (FECA) Procedures Manual, Part 2-- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.19(b) (September 2010).

⁴ 20 C.F.R. § 10.121.

⁵ 5 U.S.C. § 8101 *et seq.*

⁶ *J.H.*, Docket No. 19-1476 (issued March 23, 20201); *H.T.*, Docket No. 18-0979 (issued February 4, 2019); *John J. Carlone*, 41 ECAB 354, 358-60 (1989).

⁷ *Supra* note 6; *J.H.*, *id.*

⁸ *Supra* note 6; *see J.V.*, Docket No. 13-0295 (issued April 17, 2013) (finding that when OWCP failed to provide 30 days to submit requested evidence, it failed to follow its regulation at 20 C.F.R. § 10.121).

IT IS HEREBY ORDERED THAT the April 29, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this order of the Board.

Issued: May 5, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board